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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1295

DEATON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-110 - A-124) is reported at 502 F.2d 1221. The Board's decision and order (Pet. App. A-97 - A-108) are reported at 203 NLRB 1099; its decision and direction of election in the earlier representation proceeding (Pet. App. A-82 - A-96) are reported at 187 NLRB 780.

JURISDICTION

The judgment of the court of appeals (Pet. App. A-126) was entered on November 21, 1974, and petitioner's timely request for rehearing was denied on January 15, 1975 (Pet. App. A-125). The petition for a writ of certiorari was filed on April 15, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that owner drivers and nonowner drivers of trucks leased to the company in this case are employees of the company, rather than independent contractors.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are:

> Sec. 2. When used in this Act—
>
> * * * * *
>
> (3) The term "employee" * * * shall not include * * * any individual having the status of an independent contractor * * *.
>
> * * * * *
>
> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

A. Proceedings before the Board

1. In April 1970, Service Employees International Union, Local 623, AFL-CIO filed a representation petition with the Board seeking to represent the Company's truck drivers. The Company contended that the requested unit contained individuals who were independent contractors

under Section 2(3) of, and thus not covered by, the Act (Pet. App. A-83). At the subsequent hearing conducted to determine the status of the individuals in question, the Board found the following facts:

The Company, an "irregular route" common carrier under license from the Interstate Commerce Commission (ICC), utilizes about 400 truck drivers; about 35 drive Company-owned trucks, and the bulk of the remainder, about 355, drive trucks leased by the Company. The drivers of trucks leased by the Company fall into three categories:

a. Single-Owner Drivers who own a single truck which they drive and lease to the Company.

b. Multiple-Owner Drivers who own and lease more than one truck to the Company, and normally drive one of the leased vehicles themselves.

c. Nonowner Drivers who drive trucks leased by the Company from a multiple owner. (Pet. App. A-83 -A-84.)

Under the Interstate Commerce Act, to which the Company is subject, a carrier is permitted to augment its equipment by means of leases, but the carrier is not thereby relieved from certain duties and responsibilities imposed by that Act (Pet. App. A-84). Thus, ICC regulations provide that the carrier which leases equipment must be responsible for the "exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto * * *" (Pet. App. A-70). Moreover, the carrier is also required to make certain that any driver of leased equipment "is familiar with, and that his employment as a driver will not result in, violation of any provision of the Motor Carrier Safety Regulations of the Federal Highway Administration of the Department of Transportation" (Pet. App. A-75 - A-76). The leased equipment must also bear the identity of the carrier (Pet. App. A-74 - A-75).

The lease which defines the relationship between the Company and the truck owners may be terminated by either party upon written notice, after having been in effect for 30 days (Pet. App. A-84). Under the lease, the truck owner agrees to pay the entire cost of operating the vehicle. However, the Company is authorized to withhold sums from a truck owner in default of any monetary obligation imposed on him by the lease (Pet. App. A-85). The lease also provides that the truck owner shall "provide all labor and service herein provided for, or employ all necessary drivers, helpers, mechanics or others competent and qualified to perform the work required hereunder, and meeting the requirements of the rules and regulations of Federal, State, and local regulatory authorities," and shall "[d]irect and control his employees, including selecting, hiring, supervising, firing, training, setting wages, hours and working conditions and paying and adjusting the grievances of his employees" (*ibid.*). The lease further provides that the Company shall pay the truck owner a certain percentage of the gross revenue, which, in practice, amounts uniformly to 70 percent for the lease of a tractor and trailer and 60 percent for the lease of a tractor alone (*ibid.*). The truck owner invests about $20,000 in each truck (Pet. App. A-86).

The drivers report to the Company's dispatcher for the various hauls, where they "sign in" prior to making a haul (Pet. App. A-86). The truck owners hire their own drivers, but new drivers are, nevertheless, "checked out" by the Company's personnel office.[1] In the event a driver does

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[1]The Company president testified at the Board representation hearing that: "We check [the driver] out. We check his references where he worked, check his police record, his driving record" and "then we tell the lease operator, 'He checks out all right' or 'he doesn't check out all right'. If he doesn't check out all right, we tell [the lease operator] he has a record of accidents a mile long, he's had five chargeable accidents that are directly contributed to - by negligence, recklessness, and we don't think you want him driving your trucks, and we know we don't want him driving a truck for us and subjecting us to law suits, and claims and penalties" (Transcript of representation proceeding (R. Tr.) 59-60; Pet. App. A-119).

not perform to the Company's expectations, the Company tells the truck owner that it will not allow the driver to drive the truck leased to the Company and that the owner "has the choice of either furnishing another driver or cancelling the lease" (Pet. App. A-86; R. Tr. 37-40, 44, 77).

2. The Board (Chairman Miller dissenting) concluded that the nonowner drivers and single-owner drivers of leased trucks were employees of the Company, rather than independent contractors,[2] and thus included them in the bargaining unit sought to be represented by the Union.[3] Applying the common law right-of-control test, the Board found that, in addition to the pervasive control over the operations of the leased trucks required by federal regulations, "the Employer's control over the means by which the lease owners perform their tasks is evidenced by its initial determination of qualification of any driver hired by a lease owner, by its disqualification of any driver who fails to perform satisfactorily, by its requiring leased equipment to be inspected every 20 days, by its exclusive use of all leased equipment for the term of the lease, and by its performance of all dispatching services for both company and lease drivers alike" (Pet. App. A-88). Moreover, "the Employer, through its authority to terminate the

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[2]The Board had reached the same conclusion in an earlier case involving the Company. *Deaton Truck Lines, Inc.*, 143 NLRB 1372, affirmed, 337 F.2d 697 (C.A. 5), certiorari denied *sub nom. Teamsters Local Union 612* v. *National Labor Relations Board*, 381 U.S. 903. The Board rejected the Company's contention that its operations had materially changed since the prior decision (Pet. App. A-87 - A-88).

[3]The Board further found that the multiple-owner drivers, though not independent contractors, were supervisors, within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), and thus not properly included in the unit (Pet. App. A-89). No issue concerning that determination is raised here.

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lease at will 30 days after the commencement thereof, retains potential authority to control virtually every aspect of the means by which the lease owners conduct their operations in its behalf" (Pet. App. A 88 - A-89). In the Board's view, these elements of control by the Company outweighed the entrepreneurial functions assumed by the truck owner (Pet. App. A-89).

The Union won the ensuing representation election, and was certified as the bargaining representative for the Company's drivers, including the nonowner drivers and single-owner drivers of leased trucks (Pet. App. A-99 - A-100). The Company refused to bargain, and the Union filed unfair labor practice charges. A three-member panel of the Board (Chairman Miller dissenting) found that the Company had violated Section 8(a)(1) and (5) of the Act and ordered it to bargain with the Union (Pet. App. A-100 - A-101, A-102, A-108). The Company then filed with the Board a "Request for Reconsideration," requesting that the full five-man Board consider the status of the drivers of leased trucks and reconcile an alleged inconsistency between the instant case and the Board's decision in *Fleet Transport Company, Inc.*, 196 NLRB 436. The Board denied the Company's request "for reconsideration by the entire Board," and its request for reconsideration of the substantive issue on the ground that it "present[ed] nothing not previously considered" (Pet. App. A-109 - A-110).[4]

B. The Decision of the Court of Appeals

The court of appeals upheld the Board's decision and enforced its order, finding that "the Board did not employ improper legal standards and its findings are supported by substantial evidence" (Pet. App. A-111). The court stated:

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[4]The administrative law judge had rejected the Company's contention that *Fleet* was dispositive of the instant case (Pet. App. A-101).

> Nearly every case examining the employee-independent contractor distinction involves an alignment of investment and management responsibility departing in some degree from the classic employer-salaried employee model. The various factors bearing on the "total situation" frequently point in conflicting directions. We cannot say that in the present case the board majority gave undue weight to the control test or shortchanged entrepreneurial indicia. [Pet. App. A-114 - A-115.]

The court added:

> We agree with the Board that it is unnecessary to decide whether ICC-mandated controls alone would be sufficient to establish the employee status of non-owner drivers of leased trucks. In the present case the Board took into account the substantial nexus of control required by federal regulations and also found that the facts established the existence of "additional controls" voluntarily reserved by Deaton. Thus the Board found that the total controls were sufficient to make out employee status. We follow the same approach. See *NLRB* v. *Pony Trucking Inc.*, 486 F.2d 1039 (CA6, 1973). [Pet. App. A-116 - A-117.]

ARGUMENT

1. In *National Labor Relations Board* v. *Unitea Insurance Co.*, 390 U.S. 254, 258, this Court held that, in distinguishing between employees and independent contractors for the purposes of the Act, "common-law agency principles" are to be utilized. And the Court cautioned: "There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor * * * In such a situation * * * there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must

be assessed and weighed with no one factor being decisive" (*ibid.*). The Court added that the Board's assessment "should not be set aside just because a court would, as an original matter, decide the case the other way"; rather, "the Board's choice between two fairly conflicting views" should be sustained (*id.* at 260).

As shown above, the Board applied common law principles and considered the total employment relationship in concluding that the drivers in question were employees. And the court of appeals, after scrutinizing the record, concluded, in a detailed opinion, that substantial evidence supported the Board's findings. In these circumstances, no issue warranting further review is presented.[5]

2. Nor is a different conclusion required by petitioner's contention (Pet. 12-21) that it was denied due process because the Board decision here is contrary to the results reached by other panels of the Board in factually indistinguishable cases. The cases relied on by petitioner do not support its contention.[6]

Thus, *Fleet Transport Co.*, 196 NLRB 436, is not "indistinguishable" (Pet. 16) from the instant case. In *Fleet*, the Board found, *inter alia*, that disciplinary decisions were actually made by the owner-operators, rather than by

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[5]Nothing in *United States* v. *Silk*, 331 U.S. 704 (Pet. 21), requires that the drivers here be deemed independent contractors. There the Court stated that the "total situation" (*id.* at 719) must be assessed, and pointed out that there "are cases * * * where driver-owners * * * have been held employees * * * " (*id.* at 718). The court below found that the Board was reasonable in concluding that *Silk* is factually distinguishable (Pet. App. A-114 - A-115).

[6]In *Local 814, Teamsters* v. *National Labor Relations Board*, 512 F.2d 564 (C.A. D.C.) (Pet. Supp. Br.), on the other hand, the court found that the Board's decision was "factually similar [to] and ostensibly inconsistent" with another recently decided Board case (*id.* at 567). Accordingly, the case was remanded to the Board for clarification. The court in *Local 814* did not refer to any alleged inconsistency with the present case.

the Company, as here (*id.* at 437, 438, 439). Compare *Aetna Freight Lines, Inc.*, 194 NLRB 740, 741 (Chairman Miller concurring), and *Florida-Texas Freight, Inc.*, 197 NLRB 976, 978, n. 7 (Chairman Miller concurring), where the Board found employee status based, *inter alia*, on company disciplinary authority similar to that here.[7] In short, as the Eighth Circuit has observed, "[a]bout all that the cases demonstrate is that the test for determining the status of workers is much easier to state than it is to apply, and that each case must stand or fall on its own peculiar facts. To attempt to reconcile the many cases dealing with the problem would be futile." *Site Oil Company of Missouri* v. *National Labor Relations Board*, 319 F.2d 86, 91 (C.A. 8). Accord: *Maxwell Company* v. *National Labor Relations Board*, 414 F.2d 477, 481 (C.A. 6).[8]

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[7]Similarly in *Portage Transfer Co., Inc.*, 204 NLRB 787, 788-789 (Pet. 18), the Board, in finding independent contractor status, relied, *inter alia*, on the fact that "there is no evidence of discipline of or any attempts to discipline, either owners or drivers by the Employer." And in *Conley Motor Express, Inc.*, 197 NLRB 624, 626 (Pet. 17), the Board stated, *inter alia*, that "there is no pattern whatever of regular discipline of owner-operators for acting contrary to any prescribed means or method of operation designed by the Employer."

[8]There is no substance to petitioner's allegation (Pet. 16) that "inequality of application of the law" results from the policy of referring cases to panels. A Board panel decision is circulated to the nonparticipating members, who "note" or "clear" the decision prior to issuance. The nonparticipating members, like those on the panel, may request full Board consideration of the panel decision, and it is the Board's practice to honor such requests. Requests for reconsideration of a panel decision or for reconsideration by the full Board are normally acted on by the panel deciding the case. While such requests are not circulated to the nonparticipating members, it is the Board's practice to honor a request for full Board consideration by any member of the panel. See *Enterprise Industrial Piping Co.*, 118 NLRB 1. These procedures were followed in the instant case.

3. There is no merit to petitioner's contention (Pet. 21-22) that the court of appeals abdicated its responsibility to review the propriety of the Board's decision in this case. The passage relied on by petitioner[9] occurred after the court, in a detailed opinion, had concluded that "substantial evidence drawn from the record as a whole supports the Board's conclusion that single-truck owner-drivers and nonowner-drivers [were] 'employees' " (Pet. App. A-123). The passage was not addressed to that question but merely to petitioner's request that the case be remanded "for rehearing by the entire Board on the ground that the [instant] decision is out of harmony with subsequent Board cases" (*ibid.*).

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[9]The court stated (Pet. App. A-123 - A-124):

> Even if subsequent cases reaching the opposite result are truly indistinguishable, it is not our province to insure an abstract and academic consistency in Board decisions. The personnel and philosophies of administrative bodies are subject to constant change. Especially in an area as fraught with technical distinctions and as dependent on fact findings as the employee-independent contractor dichotomy [footnote omitted], we should decline to interfere with a Board decision reached through orderly processes under proper legal standards and supported by substantial evidence. To intervene at this point would work against the essential policy of the Act, encouraging parties to delay compliance with Board orders for as long as possible in the hope of finding support in later Board decisions and of securing a *locus poenitentiae* through the intervention of a court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1975.